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Supreme Court of the United States

OCTOBER TERM, 1942

No. 662 - 663

JOHN T. DEMPSEY, AS ADMINISTRATOR OF THE ESTATE OF GABRIEL DE FONTARCE, DECEASED,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEWIS E. PENNISH,
Counsel for Petitioner.

NORMAN CRAWFORD,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioner, John T. Dempsey, as Administrator of the Estate of Gabriel de Fontarce, Deceased, praying for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit dismissing two appeals for lack of "appellate jurisdiction"

(on the ground such appeals present "a moot question") from the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully submits:

John T. Dempsey, petitioner, was appointed (upon the petition of a creditor) by the Probate Court of Cook County, Illinois, administrator of the Estate of Gabriel de Fontarce, a Free Frenchman who died in London, England, in June of 1941 and who at the time of his death was domiciled either in Great Britain, Egypt, Eire or France (R. 4-5, 117). In his sworn complaint petitioner showed that defendant, a New York corporation *authorized to do and doing business in Illinois*, held physical possession as mere custodian or depositary, of certain securities called "Kaffirs" of a value of $120,000 belonging to the decedent (R. 3-5). Petitioner sought recovery of these securities so that they might be administered *in Illinois* (R. 7).

Petitioner showed that the assets and securities aforesaid were fully negotiable and that defendant would sell or otherwise negotiate them, whereby plaintiff would suffer irreparable loss and damage, unless defendant were restrained and enjoined from so doing (R. 6).

Decedent had never been resident or domiciled in the United States and his estate was being administered in England and Brazil, and possibly in Ireland, France and Monaco (R. 4-5). Petitioner showed that *decedent left no debts in any State of the United States except in Illinois* and that decedent's estate in Illinois would be *insolvent* unless defendant delivered said assets to plaintiff (R. 5).

Petitioner showed that although decedent's niece had attempted to start ancillary administration in New York, her petition had never been granted and no administration

had ever been commenced by appointment of a representative of said estate in New York; that no jurisdiction *in rem* or *in personam* had ever been obtained by the New York court; that decedent's niece had abandoned her application for probate proceedings in New York and would have moved to withdraw the same except that the New York Surrogate had stated he would refuse to permit such withdrawal; and that decedent's niece had no objection to the administration of said assets by plaintiff in the Probate Court of Cook County (R. 80-1).

Petitioner further showed that ancillary administration in New York would be utterly useless and wasteful of the assets concerned; that no inheritance, succession or other taxes were due to the State of New York on account of said assets; that the Surrogate's Court of New York had no power or authority to make any final distribution of said assets to decedent's ultimate heirs or distributees; and that New York administration would be particularly wasteful by reason of the court costs, administrator's fees and attorney's fees of such administration (R. 6-7, 77-9).

Petitioner further offered to obtain a waiver of any New York succession or other taxes on said assets or to pay any taxes found to be due and unpaid (R. 78). Petitioner showed that defendant claimed $10.43 as custodian fees, but denied that any such sum was due. Plaintiff showed on the contrary that defendant was substantially overpaid for its custodian services on decedent's death; but plaintiff offered to pay any custodian fees found to be due or to constitute a lien or charge upon said assets (R. 79-80).

Petitioner alleged that he was without knowledge as to the physical location of the certificates evidencing the securities sued for, but that (except for possible reference

thereto) there were no assets, securities or properties belonging to decedent in New York upon which any administration proceedings could be based (R. 80-1).

Petitioner prayed that defendant be temporarily and perpetually enjoined and restrained from negotiating the securities and from instituting any temporary administration or other probate proceedings in any other court than the Probate Court of Cook County, having to do with the administration of such assets (R. 7, 81).

A restraining order was entered as prayed by the District Court on March 7, 1942, which remained in effect until April 1, 1942 when the restraining order was dissolved (R. 11-13). From this order vacating the restraining order petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit (Cause No. 8001) (R. 64).

Subsequently on May 19, 1942 the District Court dismissed the original complaint upon defendant's motion and at the same time the trial court granted plaintiff leave to amend the complaint (R. 103); and on May 26, 1942 plaintiff filed an amended and supplemental complaint containing all the allegations of the original complaint and adding substantial allegations thereto (R. 72-85). On June 18, 1942 plaintiff still further amended the complaint with leave of the trial court (R. 94-5). Defendant on June 5, 1942 moved to dismiss the amended complaint (R. 102-4), to which motion defendant filed his answer (R. 105-8) and suggestions (R. 109-113). On the same date plaintiff moved the District Court to enter an order under Rule 75 of the Federal Rules of Civil Procedure, supplementing the record in the first appeal by including therein his amended complaint (R. 86). The District Court denied this motion and from that ruling petitioner took a second appeal (Cause No. 8058) (R. 91).

The two appeals were consolidated and were jointly disposed of by the Circuit Court of Appeals (R. 115). The Circuit Court thus had before it the allegations in both the original complaint (R. 2-10) and the amended complaint (R. 72-85, 95) at the time it made its decision herein.

The Circuit Court of Appeals for the Seventh Circuit dismissed both appeals upon the ground that it had no "appellate jurisdiction" and that such appeals presented "a moot question" because, *after* the interlocutory appeal (No. 8001) was taken, "the original bill of complaint containing the prayer for injunction, the denial of which constituted the basis for the appeal, had been dismissed by the District Court with leave to file an amended complaint within ten days if appellant so desired" and because "appellant did not appeal from this dismissal, but instead, filed his amended bill within the time allowed, including another prayer for injunction." (R. 118-120). In other words the Circuit Court of Appeals held that even though the amended complaint filed with leave of the trial court was before it on the second appeal (No. 8058) it could consider the allegations of *neither* the original complaint nor the amended complaint, the latter of which had "superseded the original one for all purposes." (R. 120).

The Circuit Court held that Section 129 of the Judicial Code "does not contemplate determination of the merits of an abandoned bill of complaint or an amended complaint subsequently filed in lieu thereof" and that "dismissal of the (original) bill entitled appellee to dismissal of the appeal from an order predicated upon that bill." (R. 120). It is to review this dismissal of the appeals for lack of "appellate jurisdiction" as a "moot question" that this petition for certiorari is filed in this Court.

Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case that it lacks "appellate jurisdiction" over this appeal directly conflicts, upon a question of Federal law, with the provisions of Section 129 of the Judicial Code and with all of the decisions of this Court and all of the other Circuit Courts of Appeals for the past forty years upon the same question.

The Questions Presented.

There are three questions presented:

1. Did the Circuit Court of Appeals for the Seventh Circuit lack "appellate jurisdiction" of an appeal under Section 129 of the Judicial Code from an order vacating a restraining order restraining the transfer of negotiable securities, upon a showing of irreparable injury pending adjudication of plaintiff's rights thereto, because after the interlocutory appeal therefrom was taken the original complaint was dismissed, and thereupon an amended complaint was filed and the amended complaint brought before the Circuit Court upon a second appeal consolidated with the first appeal?

2. Does Rule 75 (h) of the Federal Rules of Civil Procedure permit the addition to the record on appeal of matter not before the District Court when the interlocutory order appealed from was entered?

3. Should a useless and expensive ancillary administration be permitted in one state when the courts of another state, where ancillary administration is necessary and has been commenced, have complete jurisdiction over a corporation holding assets belonging to the same decedent sufficient to compel such corporation by an *in personam* decree to deliver such assets to the administrator in the latter jurisdiction? In other

words, was there a cause of action stated in plaintiff's complaints?

Reasons for the Allowance of the Writ.

Section 129 of the Judicial Code specifically grants an appeal *as a matter of right* from interlocutory orders vacating or denying restraining orders; and the uniform decisions of the several Circuit Courts of Appeals and of this Court are to the effect that the Circuit Courts of Appeals have jurisdiction of interlocutory orders vacating or denying restraining orders under Section 129 of the Judicial Code.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is *directly in conflict upon a question of Federal law* with the decisions of all the other Circuit Courts of Appeals and with the decisions of this Court upon the same question.

The question involved is important. Litigants should not be deprived of their rights in one of the Circuit Courts of Appeals to an appeal and a decision *upon the merits* of a controversy which the Federal Statutes and the relevant decisions of the other Circuits and of the Supreme Court all uniformly grant *as a matter of right.*

As to the second question, *i.e.*, whether Rule 75 was intended to permit the addition of matter not before the District Court when the interlocutory order appealed from was entered, there is no decision of the Circuit Courts of Appeals or of this Court. While it is important that the new Federal Rules of Civil Procedure be interpreted by this Court when the occasion arises, it is imperative that such Rules be not so construed as to deprive the Circuit Courts of Appeals (or this Court) of their right to inform themselves of matters relevant to an appeal transpiring in

the trial court at any time prior to final judgment in the appeals court.

As to the third question, this involves a determination of the conflict of laws between the States, which it is of the utmost importance that this Court pass upon and decide, as clearly no court except this Court can determine such conflicts between the laws of the several States. It is definitely the modern policy of the law to prevent useless and expensive ancillary administrations; and this case presents an extreme illustration of this principle.

Wherefore, petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; that said final order of said Circuit Court of Appeals be reversed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

JOHN T. DEMPSEY, as Administrator of the Estate of Gabriel de Fontarce, deceased,
Petitioner,

By LEWIS E. PENNISH,
Counsel for Petitioner.

NORMAN CRAWFORD,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion in this case on October 28, 1942. The opinion is set forth on pages 117-120 of the Record.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on October 28, 1942. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented, see this petition (pp. 1 to 5).

Specification of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in dismissing the appeals to it from the District Court of the United States for the Northern District of Illinois, Eastern Division, for lack of "appellate jurisdiction" and on the ground such appeals presented "a moot question."

2. The Circuit Court of Appeals for the Seventh Circuit erred in not entertaining said appeals and in not taking jurisdiction thereof.

3. The Circuit Court of Appeals for the Seventh Circuit erred in not deciding said appeals upon their merits.

4. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order vacating the restraining order entered by Judge Sullivan in the trial court on April 1, 1942 and in not continuing the restraining order in full force and effect and in denying petitioner's motion for a preliminary injunction.

5. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order denying petitioner's motion for the entry of an order supplementing the record on appeal pursuant to Rule 75 of the Federal Rules of Civil Procedure entered by Judge Sullivan in the trial court on June 5, 1942.

6. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that defendant's motion to dismiss the original complaint and the amended and supplemental complaint as amended should be denied.

7. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that the original complaint and the amended and supplemental complaint as amended stated a valid cause of action.

ARGUMENT.

I.

The order entered April 1, 1942 in the trial court, vacating the restraining order, is an appealable order.

That the several Circuit Courts of Appeals do have jurisdiction of appeals from orders granting or dissolving restraining orders restraining the transfer of assets, for the recovery of which suit is brought in the District Court, under Section 129 of the Judicial Code, is now too well-settled to require the citation of authority. This Court has many times held that an interlocutory order refusing a restraining order or injunction in the District Court is an appealable order *as of right* under Section 129 of the Judicial Code.

Enelow v. *New York Life Ins. Co.*, 293 U. S. 379;
Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U. S. 449;
General Electric Co. v. *Marvel Metals Co.*, 287 U. S. 430;
Simpson v. *First Nat'l Bk. of Denver*, 129 Fed. 257;
Lockman v. *Lang*, 132 Fed. 1;
McCourt v. *Singers-Bigger*, 150 Fed. 102.

All of the relevant decisions in the Circuit Courts of Appeals are, so far as is known to your petitioner, in accordance with the foregoing decisions in the Supreme Court. Indeed, we do not understand that there is any dispute on this point either in the Circuit Court of Appeals for the Seventh Circuit in this case or on the part of our opponents.

Since petitioner is entitled *as of right* to an appeal under Federal law, the failure of the Circuit Court of Appeals to decide the appeal upon its merits on the ground that it had no "appellate jurisdiction" is clearly erroneous.

II.

When an interlocutory appeal is taken under Section 129 of the Judicial Code the Circuit Courts of Appeals have both the power and the duty to determine whether plaintiff has stated a cause of action in his pleadings in the trial court.

Section 129 of the Judicial Code, granting an appeal as a matter of right from an interlocutory order or decree granting or refusing an injunction in the trial court, was originally enacted in 1891. In 1897 this Court first passed upon the duty of the Circuit Court of Appeals to determine upon such an interlocutory appeal whether plaintiff's bill had stated a valid cause of action.

In *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, defendant took an interlocutory appeal under the statute from an order granting plaintiff an injunction. At the same time defendant also assigned as error the interlocutory decree of the trial court adjudging that plaintiff's patent sued upon was valid and had been infringed. Plaintiff moved the Circuit Court of Appeals for the Ninth Circuit to dismiss the appeal in so far as it involved any question except whether the injunction should have been awarded. The Circuit Court of Appeals denied the motion, reversed the decree of the trial court, and remanded with directions to dismiss the bill. The precise issue presented to this Court was whether, upon appeal from interlocutory orders granting a temporary injunction, the Circuit Court of Appeals

can render or direct a final decree on the merits. Mr. Justice Gray in his opinion carefully considered all of the many decisions upon the question in the various Circuit Courts of Appeals and showed that in the majority of those decisions the Circuit Court of Appeals had "generally concurred in taking the broader view of the appeal itself, and of the power of the appellate court" to consider and decide the merits of the case.

After citing the statute, this Court said (p. 525):

> "The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.
>
> The power of the appellate court over the cause, of which it has acquired jurisdiction by the appeal from the interlocutory decree, is not affected by the authority of the court appealed from, recognized in the last clause of the section, and often exercised by other courts of chancery, to take further proceedings in the cause, unless in its discretion it orders them to be stayed, pending the appeal. *Hovey* v. *McDonald*, 109 U. S. 150, 160, 161; *In re Haberman Co.*, 147 U. S. 525; *Messonnier* v. *Kauman*, 3 Johns. Ch. 66.
>
> In each of the cases now before the court, therefore, the Circuit Court of Appeals, upon appeal from the interlocutory decree of the Circuit Court, granting an injunction and ordering an account, had authority to consider and decide the case upon its merits, and thereupon to render or direct a final decree dismissing the bill."

Mast, Foos & Co. v. *Stover Mfg. Co.*, 177 U. S. 485, was another patent case decided in the Circuit Court of Appeals for the Seventh Circuit in 1900. In that case the defendant took an interlocutory appeal from a preliminary injunction before there was any answer or other pleading filed; and the Circuit Court of Appeals on appeal not only reversed the order for the injunction, but dismissed the bill upon the merits. This Court held that where the question involved was one of law and was fully presented to the court, the power of the Circuit Court of Appeals was properly so exercised (p. 494) "to save the parties from further litigation," citing *Smith* v. *Vulcan Iron Works*, 165 U. S. 518.

In *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519, plaintiff filed a bill in aid of a removal proceeding, praying that defendants be enjoined from further prosecuting certain condemnation proceedings under an act alleged to be in violation of the Fourteenth Amendment. Defendant demurred to the bill and after a hearing a temporary injunction was granted restraining defendant from proceeding further to condemn the property of complainant. The Circuit Court of Appeals for the Eighth Circuit held that the statute was valid and that the trial court had no jurisdiction of the controversy. It therefore reversed the order granting the injunction and remanded the cause with directions to proceed in accordance with its opinion, whereupon the trial court dismissed the bill solely on the ground of the want of jurisdiction. This Court held, in an opinion by Mr. Justice Lamar, that (p. 523):

> "It was within the power of the Circuit Court of Appeals to make such an order on an appeal from an interlocutory order. For, while at one time there was some difference in the rulings on that subject, it was finally settled by *Smith* v. *Vulcan Iron Works*, 165 U. S.

518, that on appeal from a mere interlocutory order the Circuit Court of Appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit. *In re Tampa Suburban R. Co.*, 168 U. S. 583; *Ex parte National Enameling Co.*, 201 U. S. 156, 162; *Bissell Co.* v. *Goshen Co.*, 72 Fed. Rep. 545, 556-560."

In *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, the Circuit Court of Appeals for the Fourth Circuit reversed an interlocutory injunction and dismissed the bill on the basis of *ex parte* affidavits submitted by defendant in the trial court. This Court sustained the Circuit Court of Appeals in so far as it dissolved the temporary injunction, but reversed the dismissal of the bill upon the ground that it stated a cause of action and therefore could not properly be dismissed upon appeal without a hearing in the trial court upon the merits. This Court was careful to say, however, (pp. 280-1):

> "Where by consent of parties the case has been submitted for a final determination of the merits, or upon the face of the bill there is no ground for equitable relief, the appellate court may finally dispose of the merits upon an appeal from an interlocutory order. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 494; *Castner* v. *Coffman*, 178 U. S. 168, 184; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 287; *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, 214; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 136. But in this case the application for a temporary injunction was submitted upon affidavits taken *ex parte*, without opportunity for cross examination, and without any consent that the court proceed to final determination of the merits. Hence there was no basis for such a determination on appeal unless it appeared upon the face of the bill that there was no ground for equitable relief."

In *Meccano, Ltd.* v. *Wanamaker,* 253 U. S. 136, the trial court granted a preliminary injunction. Defendant appealed to the Circuit Court of Appeals for the Second Circuit; and during the pendency of this appeal a decision was rendered in the Circuit Court of Appeals for the Sixth Circuit, which plaintiff claimed worked an estoppel in his favor. Plaintiff in the Circuit Court of Appeals for the Second Circuit moved, upon *ex parte* affidavits and upon the decision in the Circuit Court of Appeals for the Sixth Circuit, for a final judgment in his favor on the appeal. This Court, holding that the Circuit Courts of Appeals may dispose of controversies upon their merits upon interlocutory appeals under Section 129 of the Judicial Code, nevertheless ruled that the Circuit Court of Appeals for the Second Circuit was correct in not granting plaintiff's motion and in remanding the cause to the trial court with directions to reverse the order for the preliminary injunction.

In *Deckert* v. *Independence Corp.,* 311 U. S. 282, decided in December, 1940, this Court again held that on an interlocutory appeal under Section 129 of the Judicial Code the Circuit Courts of Appeals may determine whether plaintiff's complaint does or does not state a cause of action. In that case plaintiff moved for an injunction restraining a trustee from transferring trust assets and for general relief. An interlocutory injunction was granted and an appeal taken under Section 129 of the Judicial Code. Upon such appeal the Circuit Court of Appeals for the Third Circuit also passed upon the correctness of the District Court's denial of defendant's motion to dismiss the bill. This Court held on the appeal that the Circuit Court of Appeals was fully justified in passing upon the question of whether the bill stated a cause of action. After

citing *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, and *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, as authority for the proposition that "by the plain words of Section 129 (of the Judicial Code) the Circuit Court of Appeals was authorized to consider the appeals from the temporary injunction," this Court said (p. 287):

> "However, this power is not limited to mere consideration of, and action upon, the order appealed from. 'If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.' *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141. See also *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275; *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. Accordingly, the Circuit Court of Appeals properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision. *Reed* v. *Lehman*, 91 F. 2d 919; *Miller* v. *Pyrites Co.*, 71 F. 2d 804. Compare *Gillespie* v. *Schram*, 108 F. 2d 39; *Rodriguez* v. *Arosemena*, 91 F. 2d 219; *Kneberg* v. *Green Co.*, 89 F. 2d 100; *Satterlee* v. *Harris*, 60 F. 2d 490.
>
> Respondents' motions sought to dismiss the bill because it failed to state any cause of action and because the District Court lacked jurisdiction. We hold that these motions were correctly denied."

The purport of all of the foregoing decisions is, therefore, that the Circuit Courts of Appeals are not limited upon an appeal from an interlocutory injunction to the mere question of whether the injunction order should or should not have been issued or vacated, but have the affirmative duty to determine whether plaintiff's complaint upon which the preliminary injunction has been sought does or does

not state a cause of action. As stated in the foregoing cases, the purpose of making such a decision is "to save the parties from further litigation" in the event that plaintiff's complaint is devoid of equity.

Applying these decisions, therefore, to the case at bar, it is apparent that the Circuit Court of Appeals for the Seventh Circuit in the decision here appealed from has not only misconceived its power and duty to pass upon the propriety of the interlocutory order vacating the restraining order in the District Court, but also has failed to fulfill its definite obligation to determine whether or not plaintiff's complaint does or does not state a valid cause of action.

Petitioner was entitled as of right to the decision of the Circuit Court of Appeals upon the merits of his appeal from the interlocutory order vacating the restraining order in the District Court; and to answer this question the Circuit Court must determine if there is equity in plaintiff's complaints. This right of appeal arose under Section 129 of the Judicial Code and petitioner may not be deprived thereof merely because the Circuit Court of Appeals is unwilling to examine either the original bill of complaint upon which the trial court based its decision or the amended complaint superseding the original complaint which was brought to the Circuit Court of Appeals by a separate appeal.

Plaintiff has not lost his right to appeal because he amended and supplemented his complaint; nor is the trial court prevented from proceeding with the normal disposition of the litigation merely because an interlocutory appeal was taken by plaintiff. It has always been the

law in this Court that an interlocutory appeal leaves the trial court free to continue with the litigation before it, exactly as though no such interlocutory appeal had been taken. *Ex parte National Enameling & Stamping Co.*, 201 U. S. 156. The filing of the amended complaint did not make the questions on appeal "moot". The amended complaint is *identical* with the original complaint except that paragraphs are *added* to the latter. The cause of action is precisely the same in both. Both complaints being before the Circuit Court of Appeals, it could not say that plaintiff's right to an injunction *pendente lite* was moot.

We conclude, therefore, that there is no merit to the ground set forth in the Circuit Court's opinion for its refusal to consider this appeal upon its merits. On the contrary, by the decisions of this Court cited above, the Circuit Court of Appeals should have followed the repeated requests and suggestions in plaintiff's briefs urging it to determine whether plaintiff had set forth a valid cause of action in his original and amended complaints.

III.

Rule 75 (h) does not restrict the right of a litigant to supplement a record on appeal from an interlocutory order with further proceedings in the trial court after the appeal is taken.

It appears to be the meaning of the Circuit Court of Appeals in its opinion that Rule 75 (h) of the new Federal Rules of Civil Procedure does not specifically authorize the transmittal of any matter from the District Court to the Circuit Courts of Appeals transpiring in the District Court *after* the entry of a preliminary order appealed under Section 129 of the Judicial Code.

On this subject we submit that the Circuit Court of Appeals is quite inconsistent in its opinion. On the one hand it says that it cannot examine the *amended* complaint, because the *amended* complaint was filed *subsequent* to the entry of the interlocutory order appealed from; yet at the same time it says that it can examine a motion to dismiss such interlocutory appeal filed by defendant to determine the fact that the original complaint "had been dismissed by the District Court with leave to file an amended bill of complaint within ten days if appellant so desired." A certified copy of this order was filed by defendant in support of this motion (R. 103). Petitioner filed an answer to this motion, setting forth a copy of his *amended* complaint (R. 105-8). Thus the Circuit Court of Appeals had plaintiff's *amended* complaint before it, not only as a part of the appeal in Cause 8058, but also by virtue of defendant's motion to dismiss the appeal in Cause No. 8001 and petitioner's answer thereto.

We say it is inconsistent for the Circuit Court of Appeals to state that it may examine the supplemental proceedings and pleadings in the District Court *subsequent* to the entry of the interlocutory order appealed from but *only* for the purpose of discovering that the original complaint has been amended and without any opportunity or obligation to determine whether the original or the amended complaint states a valid cause of action. Our point here is that Rule 75 (h), even if it does not *specifically authorize* the inclusion of supplementary orders and pleadings in the District Court after the entry of the interlocutory order appealed from, clearly does not *prevent* the appeals court from ascertaining the existence and contents thereof. It has always been the law that this Court and the several Circuit Courts of Appeals may acquaint themselves with all matters of record in the courts of inferior

jurisdiction, whether or not the same have transpired prior *or subsequent* to the entry of the order or orders appealed from. *Camp* v. *Gress*, 250 U. S. 308, 318; *Patterson* v. *Alabama*, 294 U. S. 600, 607.

Surely, for the Circuit Court of Appeals in this case to say that it *cannot* examine the contents of petitioner's amended complaint brought to it as a part of the consolidated record in Cause No. 8058, and yet at the same time *can* examine the very same amended complaint embodied in an answer filed by petitioner to defendant's motion in the original appeal, Cause No. 8001, is to take a position of deliberate ignorance which it was the very intention of Rule 75 (h) to avoid.

IV.

Ancillary administrations which are useless and expensive should be avoided.

It is submitted that both plaintiff's original and amended complaints state a valid cause of action.

It is beyond doubt and dispute that petitioner, as ancillary administrator in Illinois, may recover and administer any assets belonging to the decedent which are recoverable by action in Illinois.

This Court has held in *New England Life Ins. Co.* v. *Woodward*, 111 U. S. 138, and *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308, that a suit may be brought by a decedent's administrator to recover money belonging to the decedent against a non-resident debtor temporarily within the State, or a corporation doing business there, regardless of where such corporation may have been incorporated or where its principal office may be. This has been the rule also in the several States.

Fox v. *Carr*, 16 Hun. (N. Y.) 434;

Equitable Life Assur. Soc. v. *Vogel,* 76 Ala. 441;
Saunders v. *Weston,* 74 Me. 85;
Knight v. *Hudson Bay Co.,* 6 N. F. 164; and
Williams v. *Williams,* 79 N. C. 417.

It is also the rule in the lower Federal Courts:
Smith v. *New York Life Ins. Co.,* 57 Fed. 133; 67 Fed. 694;
London, Paris & American Bank v. *Aronstein,* 117 Fed. 601.

The foregoing rule is based upon the well-known principle that in an action *in personam* a defendant may be required to pay any money or take any action regarding real or personal property, even though the carrying out of such an action would involve doing an act or affecting a thing in a foreign state. See Restatement of the Law of Conflict of Laws, Sec. 97, p. 147. We cite the Illinois and Federal cases:

(a) Illinois cases so holding:
Carter v. *Carter,* 283 Ill. 324;
Poole v. *Koons,* 252 Ill. 49;
Bevans v. *Murray,* 251 Ill. 603;
White Star Mining Co. v. *Hultberg,* 220 Ill. 578;
Sercomb v. *Catlin,* 128 Ill. 556.

(b) Federal cases so holding:
Clark v. *Iowa Fruit Co.,* 185 Fed. 604;
Byrne v. *Jones,* 159 Fed. 321.

On the foregoing authority there is no lack of power or jurisdiction in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter an order or decree *in personam* requiring defendant to turn over to plaintiff the property belonging to the de-

cedent, even though defendant is a corporation incorporated elsewhere than in Illinois.

Defendant has, however, urged repeatedly in the courts below that it is exercising physical possession of the securities involved herein within the State of New York and has contended that only in New York may these assets be properly administered. We are therefore at pains to show that there is no foundation for this contention.

It has always been the law that *no ancillary administration is proper* in the absence of local creditors.

In Re Washburn's Estate, 47 N. W. 790 (Minn.);
Caruso v. *Caruso* (N. J.), 148 Atl. 882;
In Re Eaton's Will (Wis.), 202 N. W. 309;
Martin v. *Central Trust Co.,* 327 Ill. 622;
In Re Meyer's Estate, 211 N. Y. Supp. 525; affirmed 244 N. Y. 598.

Moreover under the law of New York an ancillary administrator has no power to distribute the decedent's assets to his heirs or distributees unless all of the heirs or distributees reside in New York.

Matter of Hughes, 95 N. Y. 55;
Lecouturier v. *Ickelheimer,* 205 Fed. 682.

It is affirmatively alleged in both petitioner's original and amended complaint that there are no local creditors in New York of this decedent (R. 5, 75, 79); and it is alleged in the amended complaint that there is no power in the New York Surrogate's Court to distribute the decedent's assets to his heirs or distributees since they are not all residents of New York (R. 78-9). It follows accordingly that an ancillary administration in New York of these assets would be utterly useless, and as alleged in both the

complaints, would be extremely expensive (R. 6, 76, 79). The highest court of New York has decided in the case of *In re Martin's Will,* 255 N. Y. 359; 174 N. E. 753, in a decision by Judge Cardozo, that the costs and expenses of a useless ancillary administration are ample ground for refusal to permit such an administration.

V.

This Court has power and should decide this appeal upon the merits.

It is perhaps unnecessary to cite authority showing that this Court has ample jurisdiction to dispose of this case upon its merits. Under Section 240 of the Judicial Code, in cases coming from Federal Courts the Supreme Court is given full power to enter such judgment or order as the nature of the case requires. Under Section 269 of the Judicial Code the duty is especially enjoined of giving judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This is the clear holding in such cases as *Camp* v. *Gress,* 250 U. S. 308, and *Patterson* v. *Alabama,* 294 U. S. 600. It is also clearly shown by the cases set forth in Part II of this Argument.

In the case of *Camp* v. *Gress,* 250 U. S. 308, this Court said (p. 318):

> "In cases coming from federal courts the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error (or certiorari, § 240 of the Judicial Code) requires. Revised Statutes, § 701. Circuit Court of Appeals Act of March 3, 1891, c. 517, § 11, 26 Stat.

826, 829. See also § 10 of the same act. Compare *Ballew* v. *United States,* 160 U. S. 187, 198, *et seq.* And by Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code, the duty is especially enjoined of giving judgment in appellate proceedings 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' "

And in *Patterson* v. *Alabama,* 294 U. S. 600, this Court said (p. 607):

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case. *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U. S. 503, 507; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Dorchy* v. *Kansas,* 264 U. S. 286, 289; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131."

It is particularly appropriate that this Court exercise its power to dispose of the entire merits of this controversy. Where the appeal is from an interlocutory order in the trial court, Section 129 of the Judicial Code specifically provides that interlocutory appeals shall take precedence over all other appeals to the end that such appeals

should be decided as promptly as possible. And as this Court said in *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, the appeals court should act upon the merits of the controversy "to save the parties from further litigation" whenever the question is raised as to whether there is equity in the plaintiff's complaint.

It is therefore respectfully submitted that this Court should decide in its opinion in this Court that there is equity in plaintiff's complaints at the time a decision is rendered herein.

CONCLUSION.

We conclude therefore:

1. That petitioner has been deprived, by the decision in the Circuit Court of Appeals for the Seventh Circuit, of his right to an adjudication on the merits of his appeal under Section 129 of the Judicial Code.

2. That since both petitioner's original and amended complaints were before the Circuit Court of Appeals for the Seventh Circuit in both causes No. 8001 and 8058, that court not only had the right but also the duty to pass upon the issue as to whether plaintiff had stated a valid cause of action therein.

3. That Rule 75 (h) of the Federal Rules of Civil Procedure in no way precludes petitioner's right to supplement the record on appeal from an interlocutory order by including pleadings or orders entered in the District Court subsequent to the entry of the interlocutory order appealed from.

4. That there is no want of authority in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter a valid order or decree

requiring defendant to transmit to petitioner the assets belonging to the decedent for whom petitioner is acting as administrator, in view of the fact that petitioner was appointed such administrator within the jurisdiction of and has the right to sue defendant in the District Court.

5. That a useless and expensive ancillary administration in another State which would serve no conceivable purpose and would result in material loss and damage to the decedent's property should be avoided where possible, as in this case, and that the supposed right to any such ancillary administration constitutes no defense to this action.

6. That this Court should dispose of this entire controversy by holding that there is equity in plaintiff's original and amended complaints.

Petitioner therefore prays that the order of the Circuit Court of Appeals for the Seventh Circuit dismissing the appeal for lack of "appellate jurisdiction" on the ground that this appeal "presents a moot question" should be reversed; and that this Court should decide this case upon the merits and should hold that both plaintiff's original and amended complaints state a valid cause of action.

Respectfully submitted,

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NORMAN CRAWFORD,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 662 and 663

JOHN T. DEMPSEY, AS ADMINISTRATOR OF THE ESTATE OF GABRIEL DE FONTARCE, DECEASED,
Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,
A CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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IN THE

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Opinion Below.

The opinion of the Circuit Court of Appeals, rendered on October 28, 1942, and set out in the Record on pages 117-120, is reported at 131 F. (2d) 103 (C. C. A. 7th, 1942, Advance Sheets, December 14, 1942).

Jurisdiction.

Petitioner seeks writs of certiorari under Section 240 of the Judicial Code. (28 U. S. C. A. § 347.)

We submit that petitioner's assertion that the decision of the Circuit Court of Appeals "directly conflicts, upon a

question of Federal law, with the provisions of Section 129 of the Judicial Code and with all of the decisions of this Court and all of the other Circuit Courts of Appeals for the past forty years upon the same question" (P. 6) is a gross misstatement, supported by not a single case in petitioner's brief. We submit that the decision of the Circuit Court of Appeals dismissing the appeal in Case No. 8001, No. 662 here, is in accord with the decisions of this Court upon the question decided therein. We submit that the decision of the Circuit Court of Appeals dismissing the appeal in No. 8058, No. 663 here, is in accord with all the authority available upon the question decided therein and in accord with sound legal principles. We further submit that these decisions are so clearly correct in the premises that they furnish no justification whatsoever for the granting of the writs sought herein and the exercise by this Court of its jurisdiction to review.

Statement of the Case and Questions Presented.

Because of certain omissions and inaccuracies in petitioner's "Summary Statement of Matter Involved" (P. 1-5) we are compelled to state the facts in respondent's brief, pursuant to Rule 27 (4) of the rules of this Court. (28 U. S. C. A. following § 354.)

The suit in No. 662 (No. 8001 below) was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, by the Illinois ancillary administrator of the estate of a non-resident alien decedent to gain possession of shares of stock of South African gold mining corporations left for safekeeping during his lifetime in the custody of respondent in New York. (R. 1-10, 36.) On March 7, 1942, upon *ex parte* application and without notice to respondent the District Court entered a temporary restraining order restraining respondent from disposing of these securities until the further order of the

court and from instituting or participating in any probate proceedings whatsoever except in the Probate Court of Cook County, Illinois. (R. 11-13.) Thereafter, on April 1, 1942, the District Court entered an order vacating the temporary restraining order and denying petitioner's motion for a preliminary injunction affording petitioner similar relief throughout the pendency of the action. (R. 63-64.) The appeal in No. 8001 from this order dissolving the temporary restraining order and denying a preliminary injunction was taken on April 1, 1942, and the record docketed in the Circuit Court of Appeals on May 8, 1942. (R. 64, 118.) The error relied upon by petitioner was the District Court's dissolution of the temporary restraining order and its failure to allow the motion for a preliminary injunction. (R. 65.)

Thereafter, on May 19, 1942, the District Court allowed respondent's motion to dismiss the complaint for failure to state grounds upon which relief could be granted. (R. 103.) In its order of dismissal the District Court gave petitioner leave to file an amended complaint within ten days. (R. 103.) No appeal was taken from this order dismissing the complaint, but on May 26, 1942, petitioner filed his amended and supplemental complaint, which contained the same allegations as his original complaint, together with six additional subparagraphs, and again asked a temporary restraining order and a preliminary injunction. (R. 72-85.) Petitioner on June 5, 1942, before the District Court had in any way passed on the sufficiency of the amended and supplemental complaint, or on the prayer for a preliminary injunction contained therein (R. 90, 118), moved the trial court to supplement the record on the appeal then pending in the Circuit Court of Appeals (No. 8001) by adding thereto the amended and supplemental complaint then on file in the District Court. (R. 87.) This motion the District Court denied. (R. 87.) From the order denying this motion the appeal in No. 8058 was taken on June 11, 1942.

(R. 91.) The error relied upon by petitioner was the District Court's failure to allow his motion to supplement the record in No. 8001 by including in it the amended and supplemental complaint. (R. 92.)

On May 21, 1942, respondent filed a motion in the Circuit Court of Appeals asking the dismissal of the appeal from the District Court's order vacating the temporary restraining order and denying the prayer for a preliminary injunction for the reason that, subsequent to the taking of the interlocutory appeal, the District Court had dismissed the complaint upon which the prayer for interlocutory relief was bottomed and petitioner, not appealing from this order of dismissal, had abandoned his original complaint, and substituted therefor a new and different amended and supplemental complaint. (R. 101-103.) In his answer to this motion to dismiss the appeal in No. 8001 petitioner set out his amended and supplemental complaint in its entirety. (R. 108.) The motion to dismiss was denied (R. 114), but upon its renewal at the hearing* it was allowed and the appeal dismissed. (R. 120, 121.) To review this order of dismissal in No. 8001 petitioner asks for a writ of certiorari in No. 662 in this Court upon the ground that he has been denied a decision upon the merits of his appeal to which he was entitled as a matter of right under Section 129 of the Judicial Code (28 U. S. C. A. § 227.) (P. 7.)

On July 13, 1942, in its answer to petitioner's motion in the Circuit Court of Appeals to consolidate No. 8001 and No. 8058, respondent moved the Circuit Court of Appeals to dismiss the appeal in No. 8058 from the District Court's order denying the motion to supplement the record on the appeal in No. 8001 by including therein the amended and supplemental complaint for the reason that the order was not one from which an appeal could be taken. (R. 121, 118.)†

* Cf. *Bennell Realty Co.* v. *E. G. Shinner & Co.*, 87 F. (2d) 824, 826.

† Respondent's answer containing this motion was omitted by petitioner in printing the record.

Petitioner's motion to consolidate was allowed and the two appeals consolidated, without prejudice to respondent's rights upon the hearing on the merits (R. 115), and at the hearing respondent's motion to dismiss No. 8058 was allowed and the appeal dismissed. (R. 121, 119.) To review this order of dismissal in No. 8058 petitioner asks for a writ of certiorari in No. 663 in this Court upon the ground that he has been denied a decision upon the merits of his appeal to which he was entitled as a matter of right under Rule 75 of the Federal Rules of Civil Procedure (28 U. S. C. A. following § 723c.) (P. 7-8.)

Referring to the omissions and inaccuracies in petitioner's "Summary Statement of Matter Involved," we call the Court's attention to the statement "Defendant on June 5, 1942, moved to dismiss the complaint (R. 102-4), to which motion defendant filed his answer (R. 105-8) and suggestions. (R. 109-113.)" (P. 4.) The references to the Record show that what petitioner means is that respondent moved in the Circuit Court of Appeals to dismiss the appeal in No. 8001, to which motion petitioner (not "defendant") filed his answer and suggestions.

We also call the court's attention to the omission both from the Record and petitioner's "Summary Statement" of respondent's motion in the Circuit Court of Appeals to dismiss the appeal in No. 8058 for the reason that the order appealed from was not such an interlocutory or final order of the District Court as is susceptible of appeal. That such a motion was made amply appears, however, from the opinion (R. 118) and the order disposing of the case. (R. 121-122.)

This being so, petitioner's statement that "The Circuit Court thus had before it the allegations in both the original complaint (R. 2-10) and the amended complaint (R. 72-85, 95) at the time it made its decision herein" (P. 5) is inaccurate and misleading. The complaint and the

amended and supplemental complaint were contained in proceedings docketed in and on file with the Circuit Court of Appeals, it is true, but they were not before the Circuit Court of Appeals for consideration upon their merits, and could not be until such time as the Circuit Court of Appeals should dispose of the preliminary questions raised by respondent's motions to dismiss the appeals.

The Circuit Court of Appeals did not dismiss "both appeals upon the ground that it had no 'appellate jurisdiction' and that such appeals presented a 'moot question'." (P. 5.) The court dismissed the appeal in No. 8058 on the ground that the order appealed from did not fall within the provisions of Section 128 of the Judicial Code (28 U. S. C. A. 225), and upon the additional ground that Rule 75 of the Federal Rules of Civil Procedure did not authorize the addition to and the inclusion in the record on appeal of matter "not before the District Court" at the time of the entry of the order appealed from. (R. 118-119.) Thus the appeal in No. 8058 was dismissed for the sole reason that the court had no "appellate jurisdiction". The court dismissed the appeal in No. 8001 on the ground that, by reason of the abandonment by petitioner of his complaint in the District Court, the Circuit Court of Appeals had no authority to "exercise" its "appellate jurisdiction" by studying the merits of that complaint, since any injunctive relief which petitioner might in the future obtain would have to be predicated on his amended and supplemental complaint, and not on his original complaint. (R. 119.) Thus the appeal in No. 8001 was dismissed for the sole reason that the appeal presented a "moot question".

We call the Court's attention to the fact that in dismissing the appeal in No. 8001 the Circuit Court of Appeals did not rely upon the record in No. 8058 in any way. It was informed by petitioner of the dismissal of the complaint, of its abandonment, and of the filing of the amended

and supplemental complaint by petitioner's "answer to the motion to dismiss." (R. 119, 108.)

On this state of facts, the questions presented are as follows:

1. (a) Whether an appellant is permitted to take an appeal to the Circuit Court of Appeals from an order of the District Court denying a motion to supplement the record in an appeal already pending in the Circuit Court of Appeals by including therein a pleading which was not before the District Court at the time of the entry of the original order appealed from and which had not been passed upon by the District Court. (No. 8058 below, No. 663 here.)

(b) Whether an appellant is permitted to supplement the record in an appeal already pending in the Circuit Court of Appeals by including therein a pleading which was not before the District Court at the time of the entry of the original order appealed from and which had not been passed upon by the District Court. (No. 8058 below, No. 663 here.)

2. Whether an appellant is entitled to a hearing in the Circuit Court of Appeals on an interlocutory appeal from an order of the District Court vacating a temporary restraining order previously entered and denying a preliminary injunction as prayed in his complaint when the District Court has entered a further order dismissing the complaint, with leave to appellant to file an amended complaint within ten days, from which order of dismissal appellant has failed to appeal, and when appellant has abandoned the complaint by filing an amended and supplemental complaint which has not been considered by the District Court. (No. 8001 below, No. 662 here.)

We believe that the answer to each of these questions must be in the negative and that the petition for writs of certiorari should therefore be denied.

Summary of Argument.

I.

An order of the District Court denying a motion to supplement the record on an appeal pending in the Circuit Court of Appeals is not an order from which an appeal can be taken.

(a) An appeal to the Circuit Court of Appeals is permissible only (a) from a final order or decree of the District Court and (b) from an interlocutory order or decree of the District Court involving an injunction or a receivership, and in certain admiralty cases. An appeal is not permitted from a mere procedural order of the District Court.

Judicial Code, §§ 128, 129, 28 U. S. C. A. §§ 225, 227.

Federal Rules of Civil Procedure, Rule 75(h), 28 U. S. C. A. following § 723c.

(b) The record on an appeal to the Circuit Court of Appeals from an order of the District Court denying petitioner's motion for a preliminary injunction based upon his complaint can not be supplemented so as to include in the appeal an amended and supplemental complaint filed after the appeal has been taken and upon which the District Court has had no opportunity to pass.

Federal Rules of Civil Procedure, Rule 75(h), 28 U. S. C. A. following § 723c.

Kennedy v. *U. S.*, 115 F. (2d) 624.

U. S. v. *Forness*, 125 F. (2d) 928.

Treasure Imports v. *Henry Amdur & Sons*, 127 F. (2d) 3, 4.

Austin Mfg. Co. v. *American Wellworks*, 121 Fed. 76, 77, 79.

II.

An interlocutory appeal to the Circuit Court of Appeals from an order of the District Court vacating a temporary restraining order and denying petitioner's motion for a preliminary injunction based upon his complaint should be dismissed by the Circuit Court of Appeals when, before the appeal has been passed upon, the District Court has dismissed the complaint upon which the prayer for a preliminary injunction was based for failure to state grounds upon which relief can be granted, and petitioner, not appealing from this final order of dismissal, has acquiesced therein by filing a new and different amended and supplemental complaint in the District Court.

Shaffer v. *Carter*, 252 U. S. 37, 44.

Pacific Tel. Co. v. *Kuykendall*, 265 U. S. 196, 205-206.

Smith v. *Illinois Bell Tel. Co.*, 270 U. S. 587, 588-589.

Mills v. *Green*, 159 U. S. 651, 653.

U. S. v. *Hamburg-American Co.*, 239 U. S. 466.

Board of Public Utility Commissioners v. *Compania General de Tabacos de Filipinas*, 249 U. S. 425.

Heitmuller v. *Stokes*, 256 U. S. 359, 362.

Western Elec. Co., Inc. v. *Cinema Supplies, Inc.*, 80 F. (2d) 111.

Argument.

I.

An order of the District Court denying a motion to supplement the record on an appeal pending in the Circuit Court of Appeals is not an order from which an appeal can be taken.

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Section 128 of the Judicial Code provides:

> "(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> *First.* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title." (28 U. S. C. A. § 225.)

This section gives an appellant a right of appeal to the Circuit Court of Appeals from a final order of the District Court. (The exception in which a direct review to the Supreme Court is allowed is not relevant here.)

Section 129 of the Judicial Code gives an appellant a right of appeal from an interlocutory order of the District Court granting, continuing, modifying, refusing or dissolving an injunction, and in certain receivership and admiralty cases. 28 U. S. C. A. § 227. (The language of the section here pertinent is set out below, Respondent's Brief, 20-21.)

These two sections of the Judicial Code furnish the only

bases upon which an appellant can bring an appeal before the Circuit Court of Appeals (except in bankruptcy cases, not relevant here).

The appeal in No. 663 was taken from an order of the District Court denying petitioner's motion to supplement the record on appeal. Petitioner asked the District Court to allow him to add to the record, which had been transmitted to the Circuit Court of Appeals on the interlocutory appeal from the District Court's order dissolving the temporary restraining order and denying petitioner's motion for a preliminary injunction, and had been docketed in the Circuit Court of Appeals as No. 8001, by adding to it the amended and supplemental complaint. This amended and supplemental complaint petitioner had filed in the District Court after the District Court had dismissed his original complaint for failure to state grounds upon which relief could be granted. The District Court denied petitioner's motion so to supplement the record on the appeal, and petitioner, seeking to bring his amended and supplemental complaint before the Circuit Court of Appeals despite the fact that the District Court had ruled that it was not properly a part of the record on appeal, took an appeal from this order. This appeal was docketed in the Circuit Court of Appeals as No. 8058. The Circuit Court of Appeals, after consolidating the two appeals for purposes of facilitating the argument, allowed respondent's motion to dismiss the second appeal "on the ground that it was not taken from an appealable order." (R. 118.)

This decision seems so obviously correct as to furnish no justification for argument. Indeed, in petitioner's brief we are unable to find any reference to this phase of the Circuit Court's decision. An order of the District Court dealing with the matter to be included in the record on an appeal to the Circuit Court of Appeals is obviously not a final decision upon the merits of the case, and it is only an appeal from a final decision upon the merits of a case that

Section 128 of the Judicial Code gives the Circuit Court of Appeals jurisdiction to entertain.

It is also obvious that an order of the District Court dealing with the matter to be included in the record on an appeal to the Circuit Court of Appeals is not an interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction. It, therefore, is not such an order as Section 129 of the Judicial Code gives the Circuit Court of Appeals jurisdiction to review by interlocutory appeal.

This is so even though the proceeding in which the order appealed from was entered was an injunction proceeding. The order does not have any of the attributes of a final order or of an interlocutory order passing upon an application for a preliminary injunction. It is simply a procedural order dealing with the record in the Circuit Court of Appeals.

We think it virtually admitted by the silence of petitioner's brief upon this subject that petitioner claims no right of appeal to the Circuit Court of Appeals from an order of this character which was entered by the District Court. Moreover, we know of no rule of substantive or procedural law which permits to be included in the record, on an appeal to the Circuit Court of Appeals, a pleading which was filed long after the District Court's ruling from which the appeal was taken and which therefore was not before the District Court at the time of the ruling from which the appeal was taken. Were the law to be otherwise the Circuit Court of Appeals would be considering the merits of a pleading which the District Court had never passed upon or decided. This would be distinctly unfair to the District Court. Furthermore, it would mean that the Circuit Court of Appeals would be taking over the functions of a trial court by passing on questions in the first instance which, under the law, the Circuit Court of Appeals has jurisdiction to review only after a ruling by the District Court. If it were otherwise the whole distinc-

tion between trial and appellate procedure would be destroyed.

Indeed, petitioner seeks to have this distinction further destroyed, for he now asks this court to pass upon the merits of his amended and supplemental complaint though, so far as this Record shows, his amended and supplemental complaint has not been considered either by the District Court or by the Circuit Court of Appeals. (Petitioner's Brief, 24-27.) We submit that this Court has no such original jurisdiction.

Furthermore, should petitioner have felt himself aggrieved by the order of the District Court in denying his motion to supplement the record on appeal in No. 8001, he could have, under Rule 75(h) of the Federal Rules of Civil Procedure, presented a similar motion to the Circuit Court of Appeals. The Circuit Court of Appeals would then have had authority to decide as an original question whether or not the matter which petitioner sought to include in the record should be included, regardless of any ruling which had been made in the District Court. Obviously the proper procedure would have been for petitioner to make such a motion in the Circuit Court of Appeals, instead of trying to accomplish the same result by indirection by appealing from an unappealable order of the District Court. However, should petitioner have presented such a motion to the Circuit Court of Appeals, that court, under the facts in this case, could not possibly have afforded petitioner any relief under Rule 75 (h), as will be shown in the next portion of this brief, (Respondent's Brief, I (b), 13-20.)

Federal Rules of Civil Procedure, Rule 75(h)
28 U. S. C. A., following § 723 c.

(b) The record on an appeal to the Circuit Court of Appeals from an order of the District Court denying petitioner's motion for a preliminary injunction based upon his complaint cannot be supplemented so as to include in

the record on appeal an amended and supplemental complaint filed after the appeal has been taken and upon which the District Court has had no opportunity to pass.

Although petitioner, by his silence, apparently concedes that the Circuit Court of Appeals was correct in its ruling that the order appealed from in No. 8058 (No. 663 here) was not an appealable order, he nevertheless insists that it is proper for the Circuit Court of Appeals to consider his amended and supplemental complaint in passing upon the appeal from the interlocutory order denying a preliminary injunction based upon the original complaint, even though the amended and supplemental complaint was filed in the District Court long after the interlocutory appeal was taken and after the original complaint was dismissed by the District Court. (Petitioner's Brief, 19-20.) Petitioner asserts that his right thus to include in the record on appeal in No. 8001 proceedings subsequent to the date of the order appealed from is based upon Rule 75 (h) of the Federal Rules of Civil Procedure. This rule provides as follows:

> "(h) *Power of Court to Correct Record.* It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court."
>
> Federal Rules of Civil Procedure, Rule 75(h), 28 U. S. C. A. following § 723c.

Petitioner's position is that this rule allows him to bring up to the Circuit Court of Appeals any pleading on file in the District Court, whether or not such pleading was filed in the District Court subsequent to the appeal, and whether or not the District Court has had an opportunity to pass upon such pleading.

We do not believe that Rule 75(h) has any such purpose. It is perfectly clear from a reading of the rule that the only additional material matters which may be included in the record on appeal are those which have been omitted by error or accident or misstated. It cannot be said that the amended and supplemental complaint was omitted from the record on appeal in No. 8001 for any of these reasons, as the amended and supplemental complaint was not filed in the District Court until May 26, 1942, while the appeal from the interlocutory order denying the preliminary injunction was taken on April 1, 1942 and docketed in the Circut Court of Appeals as No. 8001 on May 8, 1942. (R. 72-85, 64, 118.) This being so, neither the District Court nor the Circuit Court of Appeals had any power to allow such a pleading to be included in the record in No. 8001.

Our view that Rule 75(h) allows only the inclusion in the record on appeal of matter which has been omitted by error or accident, or which has been misstated, is supported by a number of cases decided since the adoption of the rules. In *Kennedy* v. *U. S.*, 115 F. (2d) 624, the appellee filed a petition asking the Circuit Court for an order requiring that a portion of the evidence alleged to have been received in the trial court be certified to the Circuit Court of Appeals and that the District Court be required to make specific findings favorable to the appellee. The court held that it had no power to order the inclusion of findings which had not actually been made by the District Court. Such findings could not be added to the record, either by the District Court or the Circuit Court of Appeals, under Rule 75(h). The court said:

"Rule 75(h) gives to the District Court and to this

> court power to correct the record only as to 'what occurred in the District Court' not to add or cause to be added to the record findings which were never made." (115 F. (2d) at 625.)

The analogy between this case and the case at bar is simple. In this case the appellant sought to have added to the record under Rule 75(h) a finding which the District Court had not made. In the case at bar (No. 8058) petitioner sought to have added to the record then on file with the Circuit Court of Appeals in No. 8001 a pleading which was not before the District Court at the time of the entry of the order appealed from in No. 8001. In both cases Rule 75(h) affords no sanction for such procedure for the reason that it is designed to allow the correction of matters occurring in the District Court up to and including the time of the entry of the order appealed from. It is not intended to allow the inclusion in the record of matter which did not occur at all, or of matter which occurred after the appeal was taken.

In *U. S.* v. *Forness*, 125 F. (2d) 928, and in *Treasure Imports* v. *Henry Amdur & Sons*, 127 F. (2d) 3, the Circuit Court of Appeals held that the District Court had no authority under Rule 75(h) to deal with the record except to correct misstatements or omissions. In these cases the District Court had improperly ordered certain matter stricken from the record, but, since the governing principle is that the only power given by Rule 75(h) to the District Court to deal with the record is the power to correct misstatements or omissions, it is clear that the District Court has no more power to include in the record a pleading which was not on file in the District Court at the time of the entry of the order appealed from than it has to delete from the record matter which should have been included therein.

In *Treasure Imports* v. *Henry Amdur & Sons*, 127 F.

(2d) 3, Judge Charles E. Clark, speaking for the Second Circuit Court of Appeals, said:

> "F. R. C. P. 75(h) gives the district court power only to correct misstatements or actual omissions." (127 F. (2d) at 4.)

The principle that on an appeal the correctness of the order appealed from must be considered in the light of the pleadings which were before the District Court when it entered the order, and not in the light of pleadings subseqently filed is not a new or novel rule of law, as is shown by *Austin Mfg. Co.* v. *American Wellworks,* 121 Fed. 76, cited in the opinion of the Circuit Court of Appeals in the case at bar. Judge Sparks, quoting from that case, said:

> "But the correctness of the order must be considered under the facts and circumstances of the case as presented below, and 'from the same standpoint as that occupied by the court granting it' * * * 'Hence the matter contained in the supplemental record is not properly a part of the record in this cause and cannot be considered by us." (121 Fed. at 77, R. 119.)

In this case the appellant attempted to include in the record certain material first submitted to the District Court after the entry of the order appealed from by filing an "additional transcript of record". The court said:

> "An 'Additional Transcript of Record', so called, is presented on behalf of the appellant, purporting to contain such matter, and certified by the clerk of the circuit court as 'filed in said court on the 9th day of January, 1902', pursuant to a stipulation of counsel for both parties, therewith certified, but it constitutes no part of the record on appeal. The hearing occurred November 16, 1901. The opinion was filed and the injunctional order entered December 30, 1901. Appeal was allowed the same day, and perfected January 4, 1902, when the assignment of errors was filed. As no rehearing or other subsequent action of the trial court appears, the matter filed January 9, 1902, cannot enter into the record through stipulation, and can-

not be considered on the appeal, irrespective of the fact that objection thereto is now raised by counsel. *The jurisdiction of this court is appellate only. Its review in law or equity is limited to the record of matters which were before the trial court, and cannot be enlarged or affected by subsequent stipulations between the parties. Maxwell Land-Grant Case,* 122 U. S. 365, 375, 7 Sup. Ct. 1271, 30 L. Ed. 1211; *Randolph* v. *Allen,* 19 C. C. A. 353, 73 Fed. 23, 31; *Case* v. *Hall,* 36 C. C. A. 259, 94 Fed. 300, 302." (121 Fed. at 79, italics supplied.)

Petitioner, on finding no specific authority either in the language of Rule 75(h) or in the cases that have been decided both before and after the adoption of the Federal Rules of Civil Procedure upon this point, relies upon the argument that the Circuit Court of Appeals in its opinion in the case at bar is inconsistent. This inconsistency petitioner finds in the Circuit Court's refusal to pass upon the merits of the amended and supplemental complaint on the one hand, while on the other hand the Circuit Court of Appeals has dismissed the appeal from the interlocutory order denying the preliminary injunction for the very reason that the original complaint has been dismissed and abandoned and an amended and supplemental complaint filed. (Petitioner's Brief, 20-21.)

We do not see any inconsistency in this position. The opinion makes it plain that the Circuit Court of Appeals did not look to the record in No. 8058 to inform itself, in considering No. 8001, of the fact of the dismissal of the original complaint and the filing of the amended and supplemental complaint. It was not necessary for the Circuit Court to look outside the proceedings in No. 8001 to find that the original complaint had been dismissed and an amended and supplemental complaint filed. This is so because respondent's motion to dismiss the appeal in No. 8001 attached a certified copy of the order of the District Court dismissing the original complaint (R. 103), and be-

cause petitioner's answer to respondent's motion to dismiss the appeal included his amended and supplemental complaint in its entirety. (R. 108.) Thus the Circuit Court of Appeals did not look to the record in No. 8058 in passing upon respondent's motion to dismiss the appeal in No. 8001. The Circuit Court of Appeals did not "examine" the supplemental proceedings and pleadings in the District Court subsequent to the entry of the interlocutory order appealed from. (Petitioner's Brief, 20.) The opinion states that the fact that petitioner did not appeal from the dismissal of the original complaint, but instead acquiesced therein and filed his amended and supplemental complaint, was "shown by his answer to the motion to dismiss". (R. 119.)

Indeed it would have been impossible for the Circuit Court of Appeals to take an inconsistent position with reference to the two appeals before it. This is so because the questions in each appeal were entirely different. The question in No. 8001 was whether or not the appeal should be dismissed because it had become moot. In order to answer the question whether or not an appeal has become moot it is obvious that an appellate court may inform itself by looking to matters extrinsic to the record certified to it by the court below. If this were not so it would be impossible for an appellate court to ascertain whether or not an appeal had become moot since the appeal was taken. The fact that an appeal has become moot "when not appearing in the record, may be proved by extrinsic evidence." (Respondent's Brief, 25; *Mills* v. *Green,* 159 U. S. 651 at 653.) Therefore the Circuit Court of Appeals would not have been inconsistent even if it had looked to the record in No. 8058 in determining that the appeal in No. 8001 was moot at the time when it refused to examine on the merits the sufficiency of the amended and supplemental complaint contained in the record in No. 8058.

It is therefore clear that, quite apart from the fact that the order appealed from in No. 8058 was not an appealable order, the District Court ruled correctly in refusing to supplement the record in No. 8001 on the appeal from the interlocutory order dissolving the temporary restraining order and denying petitioner's motion for a preliminary injunction. We submit that on this state of the record there is absolutely no justification for the granting by this court of the petition in Case No. 663 for the writ of certiorari to the Circuit Court of Appeals in Case No. 8058.

II.

An interlocutory appeal to the Circuit Court of Appeals from an order of the District Court vacating a temporary restraining order and denying petitioner's motion for a preliminary injunction based upon his complaint should be dismissed by the Circuit Court of Appeals when, before the appeal has been passed upon, the District Court has dismissed the complaint upon which the prayer for a preliminary injunction was based for failure to state grounds upon which relief can be granted, and petitioner, not appealing from this final order of dismissal, has acquiesced therein by filing a new and different amended and supplemental complaint in the District Court.

The right of a plaintiff to take an interlocutory appeal to the Circuit Court of Appeals from an order of the District Court denying an application for a preliminary injunction is afforded by Section 129 of the Judicial Code, which provides as follows:

> "Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending

receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; * * *." (28 U. S. C. A. § 227.)

Petitioner's position is that this statute affords him an absolute right to a ruling by the Circuit Court of Appeals upon the merits of his prayer for a preliminary injunction, and also upon the question whether or not his complaint states grounds upon which relief can be granted, regardless of the status of his case in the court below. We have no quarrel with petitioner's cases holding that an interlocutory appeal is permitted from an order of the District Court granting, continuing, modifying, refusing or dissolving an injunction. (Petitioner's Brief, 11.) Likewise we have no quarrel with petitioner's cases holding that in certain circumstances it is proper for the Circuit Court of Appeals in ruling upon an interlocutory appeal, to pass upon the sufficiency of the bill of complaint. (Petitioner's Brief, 12-19.) However, we submit that petitioner is given no vested right to appeal from an interlocutory order denying a preliminary injunction, when, before the Circuit Court of Appeals has had an opportunity to pass upon his interlocutory appeal, the District Court has dismissed his complaint for failure to state grounds upon which relief can be granted, and when, furthermore, petitioner has not appealed from this final order of dismissal, but rather has acquiesced therein by filing a new and different amended and supplemental complaint. It is our view that if the complaint upon which the prayer for the preliminary injunction is based is dismissed by the District Court and petitioner takes no appeal from this dismissal, but abandons his complaint, an interlocutory appeal from the denial of a preliminary injunction presents questions which are,

and in the nature of things can be, only moot. This is so because, if the Circuit Court of Appeals should grant petitioner's prayer for a reversal of the order denying the preliminary injunction, it would still be impossible for petitioner to obtain relief in the District Court insofar as his original complaint is concerned for the reason that it has been dismissed and no appeal has been taken from the final order of dismissal.

Three cases decided by this Court amply support our view. In *Shaffer* v. *Carter*, 252 U. S. 37, upon an application for a preliminary injunction the District Court not only refused the injunction but also dismissed the bill of complaint. The plaintiff took an interlocutory appeal from the order denying his application for a preliminary injunction. Shortly thereafter he took an appeal from the final decree dismissing the action. This Court dismissed the interlocutory appeal and held that only an appeal from the final order was proper in view of the fact that a final order had been entered. Referring to the appeal from the final decree of dismissal, this Court said:

> "The latter appeal is in accord with correct practice, since the denial of the interlocutory application was merged in the final decree." (252 U. S. at 44.)

A similar situation arose in *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196. This Court said:

> "But it is said that the appeal from the interlocutory decree in No. 540 was merged in the appeal from the final decree in No. 739, and therefore should be dismissed. A motion was made for this purpose. We think that under *Shaffer* v. *Carter*, 252 U. S. 37, 44, this motion should be granted; * * *." (265 U. S. at 205-206.)

In *Smith* v. *Illinois Bell Tel. Co.*, 270 U. S. 587, the preliminary and final injunctions were granted, rather than denied, but the appeal from the interlocutory order was dismissed, this Court reaching the same result upon this

point as in the cases in which the interlocutory orders denied preliminary injunctions. In this case the District Court allowed the plaintiff's motion for a preliminary injunction, and later a final decree was entered granting the plaintiff the relief sought in his bill. The defendant appealed both from the interlocutory order and from the final decree. The appeal from the interlocutory order was, upon the plaintiff's motion, dismissed. This Court said:

> "The appeal in No. 193 is from an order previously entered, granting an interlocutory injunction. A motion to dismiss that appeal, on the ground that the order for the interlocutory injunction had become merged in the final decree, was submitted, but consideration postponed to the hearing on the merits. The motion is now granted and the appeal in No. 193 dismissed. *Shaffer* v. *Carter*, 252 U. S. 37, 44; *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 205. In the cases cited, both interlocutory and permanent injunctions had been denied; here they were granted; but the record discloses no reason which prevents the same principle from being applicable." (270 U. S. at 588-589.)

It is true that there is a distinction between the three cases above discussed and the situation in the case at bar (No. 8001). In the case at bar petitioner took no appeal from the order of the District Court dismissing his complaint, whereas in the cases cited appeals were taken both from the interlocutory and from the final orders of the trial court. However, it is hard to see that this distinction should make any difference in the result. The preliminary injunction in each case is sought as auxiliary to the main relief asked in the complaint. In the cases cited it was held to be unneccessary for the appellate court to decide whether or not the District Court ruled correctly on the application for preliminary injunction, since the propriety of the District Court's ruling would necessarily be decided by the appellate court's decision upon the main case. Thus the District Court's ruling upon the application for a

preliminary injunction was necessarily merged in its ruling upon the prayer for final relief. It follows that in the case at bar the District Court's denial of petitioner's motion for a preliminary injunction merged in and became a part of that court's final decision dismissing the complaint for failure to state grounds upon which relief could be granted.

This analysis shows that petitioner's assertion that he has been deprived of his right under Section 129 of the Judicial Code of interlocutory appeal is wholly without merit. If petitioner had been anxious to secure a ruling by the Circuit Court of Appeals upon his original complaint he could, and should, have appealed from the final order of dismissal. In ruling upon this final decision the Circuit Court of Appeals would necessarily have decided whether or not petitioner was entitled to any interlocutory, as well as any final, relief.

This view is further supported by the fact that, if the Circuit Court of Appeals had considered petitioner's interlocutory appeal and had decided in petitioner's favor, and had remanded the case to the District Court with directions to issue a preliminary injunction in accordance with the prayer of the original complaint, there would have been nothing upon which the decision of the Circuit Court of Appeals could act, for the reason that at that time the original complaint had been dismissed by the District Court, had been abandoned by petitioner, and petitioner had in a new and different amended and supplemental complaint sought a preliminary injunction in the District Court. It is, therefore, apparent that should this petition for certiorari be granted, and should the order of the Circuit Court of Appeals dismissing the appeal be reversed by this Court, there could still be no effectual relief given petitioner upon the basis of his original complaint. Petitioner has put himself in this position by allowing the complaint which furnished the basis for his interlocutory ap-

peal to be stricken by the District Court without challenging this order by appeal, and by acquiescing in the District Court's action by electing to base his claim for relief upon his new amended and supplemental complaint.

It has long been the rule of the Federal courts that it is improper and unnecessary for appellate courts to decide questions which, by reason of events occurring subsequent to the taking of the appeal, have become moot. This means that an appellate court will not decide a question if its decision will be of no benefit to the appellant because of some supervening event which has occurred pending the appeal. In *Mills* v. *Green,* 159 U. S. 651 this Court stated the rule as follows:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord* v. *Veazie,* 8 How. 251; *California* v. *San Pablo & Tulare Railroad,* 149 U. S. 308." (159 U. S. at 653.)

This rule has been applied by this Court in many cases in which supervening events have made it futile for the court to pass upon the merits. For instance, in *Mills* v. *Green,* 159 U. S. 651, an injunction was sought involving an election dispute. Pending the appeal the election took place. This Court held that it would not pass upon the merits of the appeal because, by passing upon the contro-

versy, the Court would not be able to afford the appellant any relief, even if the merits of the case should be found to have been in the appellant's favor.

In *U. S.* v. *Hamburg-American Co.*, 239 U. S. 466, this Court reversed and dismissed an anti-trust suit brought against two German and two British firms, the court taking judicial notice of the fact that the breaking out of war between Germany and England in 1914 had ended any possibility for further illegal acts by a combination of German and British firms. In other words, the Court could not, without disregarding its duty, pass upon the questions at issue "because of their absolute want of present actuality" (239 U. S. at 475). It is hard to see how an interlocutory appeal from an order denying a preliminary injunction has any further "present actuality" after the complaint upon which the prayer for preliminary injunction was based has been dismissed by the District Court and abandoned by petitioner.

In *Board of Public Utility Commissioners* v. *Compania General de Tabacos de Filipinas*, 249 U. S. 425, an appeal from a decision of the Supreme Court of the Philippines construing a Philippine statute was brought to this Court. Pending the appeal the statute was amended. This Court reversed the judgment and remanded the case with directions to dismiss, for the reason that the question had become moot. In the case at bar petitioner's rights depend not upon a statute but rather upon a complaint. In the cited case the repeal of the original wording of the statute and the amendment thereof made it unnecessary for this Court to consider the suit as it originally stood. Any further rights of the appellant were based upon the new statute. Similarly, in the case at bar petitioner has no further rights under his original complaint and any rights he does have must, of necessity, be based upon the amended and supplemental complaint filed after the dismissal of the original complaint.

Again, in *Heitmuller* v. *Stokes,* 256 U. S. 359, this Court refused to pass upon a case in which the question presented had become moot. The plaintiff below sued for possession of real estate and got a judgment. The defendant brought the case to this Court by writ of error. During the pendency of the litigation the plaintiff sold the property and moved this Court to dismiss the appeal for the reason that he no longer had an interest in the case. This Court so held and reversed and remanded the decrees below with directions to dismiss, saying:

> "It has often been held that this court will not decide moot cases." (256 U. S. at 362.)

An analogous situation is presented by *Western Electric Co.* v. *Cinema Supplies, Inc.,* 80 F. (2d) 111, cited by Judge Sparks in the opinion in the decision below. (R. 119.) In this case, plaintiff, suing for a patent infringement, moved for a preliminary injunction and took an interlocutory appeal from the District Court's denial of this motion. The District Court, however, gave plaintiff leave to renew his motion for preliminary relief in the event that the defendant should continue to do certain acts which it promised to desist from doing. During the pendency of the appeal in the Circuit Court of Appeals, plaintiff renewed his motion in the District Court and a preliminary injunction was granted. Thereupon, the Circuit Court of Appeals dismissed the interlocutory appeal for the reason that it had become moot. In this case the appellant had secured the relief in the court below which he was seeking. In the case at bar, petitioner, by acquiescing in the dismissal of his complaint and filing an amended and supplemental complaint, no longer continues to ask in the District Court the relief sought by him in the interlocutory appeal in the Circuit Court of Appeals.

An additional reason why Judge Sparks, in the case at bar, felt that it would be improper for the Circuit Court of Appeals to consider this appeal was that, on the record

as it stood in the Circuit Court of Appeals, that court had no way of knowing whether or not petitioner, upon his amended and supplemental complaint, had obtained a preliminary injunction in the District Court or that such a situation might not develop. (R. 119.) Petitioner's answer to respondent's motion to dismiss the appeal showed that the District Court, by allowing petitioner to file an amended and supplemental complaint, had afforded him an additional opportunity to obtain preliminary relief similar to that sought upon the original complaint upon such facts as might be shown in the amended and supplemental complaint.

It seems clear, therefore, that the cases cited by petitioner (Petitioner's Brief, 12-19) with respect to Section 129 of the Judicial Code (28 U. S. C. A. § 227) are entirely beside the mark. Petitioner in this case (No. 8001) has not been denied the right to take an interlocutory appeal from an order of the District Court dissolving a temporary restraining order and denying a motion for preliminary injunction. What has happened here is that the Circuit Court of Appeals has ruled in favor of respondent's contention that it is not proper for it to pass upon the order of the District Court denying preliminary relief, when the complaint upon which the prayer for preliminary relief is bottomed has been dismissed and abandoned. If petitioner really wished the Circuit Court of Appeals to pass upon the question of whether or not his original complaint stated grounds upon which relief could be granted, he should have taken an appeal from the District Court's final order of dismissal.

Furthermore, even though petitioner has abandoned his original complaint, he is still not denied any right of appeal because, if the District Court should refuse to grant him the preliminary injunction sought by his amended and supplemental complaint (which is set out in full in his answer to respondent's motion to dismiss the appeal (R.

105-113)), he could take an interlocutory appeal to the Circuit Court of Appeals from such an order under Section 129 of the Judicial Code (28 U. S. C. A. § 227). Finally, if the District Court should dismiss the amended and supplemental complaint for failure to state grounds upon which relief could be granted, petitioner could appeal to the Circuit Court of Appeals from such a final order under Section 128 of the Judicial Code (28 U. S. C. A. § 225). It is therefore obvious that petitioner has not been deprived by the Circuit Court of Appeals of any rights of appeal given to him by the Judicial Code.

Thus it appears that what petitioner tried to persuade the Circuit Court of Appeals to do, and what he will try to persuade this Court to do, should this writ be granted, is to obtain a decision as to the merits of a complaint which has been dismissed and abandoned in the District Court at the same time as he is further litigating his rights in the District Court, basing his rights upon his new and different amended and supplemental complaint. Such a procedure, we submit, is unwarranted by Section 129 of the Judicial Code (28 U. S. C. A. § 227), is not sanctioned by any of the cases cited by petitioner (Petitioner's Brief, 12-19), is forbidden by the cases discussed above, and would be extremely unfair to the Circuit Court of Appeals, the District Court and to respondent. We submit that on this state of the record there is absolutely no justification for the granting by this court of the petition in Case No. 662 for the writ of certiorari to the Circuit Court of Appeals in Case No. 8001.

Conclusion.

We have not discussed in this brief for respondent any of the points in petitioner's brief which deal with the rights of the parties, as asserted in petitioner's amended and supplemental complaint, in and to the securities involved in this litigation. (Petitioner's Brief, 21-26.) This is for the reason that it is patently absurd to think that this Court would in the first instance, as petitioner has asked it to do, pass upon such questions when, so far as the record shows, they have not been considered by either the District Court or the Circuit Court of Appeals.

From what has been said it is clear that the order of the District Court denying petitioner's motion to supplement the record on appeal to the Circuit Court of Appeals in No. 8001 by the inclusion therein of the amended and supplemental complaint was not an appealable order under Sections 128 and 129 of the Judicial Code. Furthermore, it is clear that the amended and supplemental complaint, which was filed subsequent to the entry of the order appealed from in No. 8001, and which petitioner sought to have included in the record on that appeal, could not properly have been included therein. Therefore the order of the Circuit Court of Appeals dismissing the appeal in No. 8058 was correct in the premises and violated no right of petitioner. For this reason we submit that the petition for a writ of certiorari in No. 663 should be denied.

It is also clear that the interlocutory appeal to the Circuit Court of Appeals in No. 8001 from the order of the District Court vacating the temporary restraining order and denying petitioner's motion for a preliminary injunction was properly dismissed by the Circuit Court of Appeals because, during its pendency, the complaint upon which the prayer for a preliminary injunction was based was dismissed by the District Court for failure to state grounds upon which relief could be granted, and because petitioner

in not appealing from this final order of dismissal acquiesced therein by filing a new and different amended and supplemental complaint in the District Court. Therefore the order of the Circuit Court of Appeals dismissing the appeal in No. 8001 was correct in the premises and violated no right of petitioner. For this reason we submit that the petition for a writ of certiorari in No. 662 should be denied.

Respectfully submitted,

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Dated February 15, 1943.